**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **SHARON MANCUSO** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,029,957 |
| **RUFFIN COMPANIES** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **AMERICAN HOME ASSURANCE CO.** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent and its insurance carrier appealed the March 29, 2007, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Dale V. Slape of Wichita, Kansas, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier.

The record on this appeal is the same record as that considered by Judge Clark and includes the transcript of the June 29, 2006, Preliminary Hearing held in Docket No. 1,029,194 with Claimant's Exhibits 1 through 5 and Respondent's Exhibits 1 and 2; the transcript of the March 27, 2007, Preliminary Hearing with Respondent's Exhibits 1 and 2, and the pleadings contained in the administrative file.

## ISSUES

Claimant alleges on March 4, 2006, she fell and injured her right arm (among other parts of her body) while working for respondent.[1] In an earlier preliminary hearing Order, which was entered on June 29, 2006, under Docket No. 1,029,194, Judge Clark granted claimant's request for medical benefits. That Order was appealed to this Board, which affirmed the Judge's decision. Respondent and its insurance carrier then requested a second preliminary hearing, which was held in this claim on March 27, 2007, to terminate claimant's benefits. Following the second preliminary hearing, Judge Clark entered the

[1] The March 4, 2006, accident is also one of the accidents alleged in Docket No. 1,029,194.

March 29, 2007, Order in which the Judge denied respondent and its insurance carrier's request to terminate benefits.

Respondent and its insurance carrier contend Judge Clark erred. They assert claimant has not established she injured her right arm in an accident that arose out of and in the course of her employment with respondent. They argue that Dr. George L. Lucas, who treated claimant in the past and whom the Judge initially authorized to treat claimant, believes the ulnar nerve decompression surgery he performed on claimant's right arm was not caused by her alleged March 4, 2006, accident. They also argue claimant failed to provide respondent with timely notice of her accident as she failed to notify respondent within 10 days of the accident and she also failed to prove there was "just cause" to extend the notice period from 10 to 75 days. Consequently, respondent and its insurance carrier request the Board to reverse the March 29, 2007, preliminary hearing Order.

Claimant contends respondent and its insurance carrier are pressing the same issues that were presented in the first preliminary hearing. Claimant also argues Dr. Lucas' opinion is not surprising as he has testified many times for insurance carriers. In addition, claimant asserts that Dr. Lucas' opinion on compensability is not binding on the fact finder and that the real issue is whether claimant's March 2006 accident aggravated or intensified a pre-existing condition.

The issues raised in this appeal by respondent and its insurance carrier are:

1. Did claimant injure or aggravate her right arm in a March 4, 2006, accident that arose out of and in the course of her employment with respondent?

2. If so, did claimant provide respondent with timely notice of that accident?

3. If so, is claimant's present treatment related to that accident?

## FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant fell and injured her right arm on March 4, 2006, when she slipped in water while performing her work activities for respondent. But this is not the first time that claimant has experienced symptoms in her arms. Over a period of several years before March 2006, Dr. George L. Lucas removed four cysts, performed bilateral carpal tunnel release surgeries on claimant's hands, and removed a bone from claimant's hand or wrist. Despite those earlier problems and surgeries, when claimant began working for respondent

in April 2005 she had no numbness or tingling in her upper extremities. That changed, however, on March 4, 2006, when she fell at work.

Following the first preliminary hearing, which was held in Docket No. 1,029,194 in June 2006, the Judge authorized Dr. Lucas to treat claimant. It appears Dr. Lucas saw claimant in July 2006 and requested an electrodiagnostic study to determine whether she had a nerve compression at the elbow or wrist. That study was done and it indicated claimant had compression of the ulnar nerve at the elbow. During the clinical examination on August 9, 2006, the doctor found claimant had decreased sensation in her little and ring fingers and a positive Tinel sign in the ulnar groove. But the doctor did not find atrophy in her right hand. Dr. Lucas recommended and subsequently performed ulnar nerve decompression surgery on an unknown date.

On September 22, 2006, Dr. Lucas sent a letter to Mr. McCurdy in which the doctor advised that claimant had experienced intermittent complaints of numbness in the ulnar nerve distribution going as far back as 1993 and had been given a prior diagnosis of ulnar neuritis. Accordingly, the doctor wrote that he believed claimant's "current situation is due to continuing and persisting ulnar nerve irritation at the elbow and is not likely [the] result of an alleged injury of March 4, 2006."[2] But Dr. Lucas did not address whether claimant's fall aggravated, accelerated, or intensified any preexisting condition in her right arm.

Claimant's testimony that she injured her right arm in the March 4, 2006, fall is credible. That evidence establishes, at the very least, that claimant aggravated the preexisting ulnar nerve problem in her arm. At the time she began working for respondent, claimant had no numbness or tingling in her right arm. In addition, claimant had not sought or received medical treatment for her upper extremities for several years before her March 2006 accident. This record establishes that before her March 2006 fall, claimant was able to perform her regular job duties without ulnar nerve complaints. Accordingly, the undersigned Board Member finds claimant either injured or aggravated her right arm in the March 2006 accident, which resulted in the medical treatment provided by Dr. Lucas.

## PRINCIPLES OF LAW

The Workers Compensation Act places the burden of proof upon the injured worker to establish the right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier

[2] P.H. Trans. (March 27, 2007), Resp. Ex. 1.

[3] K.S.A. 2005 Supp. 44-501(a).

of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[4]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[5] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[6]

A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.[7]

Preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by the entire five-member Board.

## ANALYSIS

Claimant has established that she injured her right arm in the March 4, 2006, accident, which resulted in the medical treatment provided by Dr. Lucas.

The issue whether claimant provided respondent with timely notice of the March 2006 accident was addressed in the first preliminary hearing Order entered by Judge Clark on June 29, 2006. That Order was affirmed by this Board in its Order dated September 29, 2006. As there was no new evidence presented at the more recent preliminary hearing regarding the notice issue, the Board's September 29, 2006, decision that claimant provided respondent with timely notice will not be disturbed.

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[4] K.S.A. 2005 Supp. 44-508(g).

[5] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[6] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[7] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[8] K.S.A. 44-534a.

## CONCLUSION

The Judge did not err in denying respondent and its insurance carrier's request to terminate claimant's workers compensation benefits. Claimant either injured or aggravated her right arm in her March 2006 fall at work. That accident arose out of and in the course of her employment with respondent. Claimant provided respondent with timely notice of the accident as required by the Workers Compensation Act. And, finally, claimant experienced symptoms in her right arm for which she was given authorization to see Dr. Lucas for medical treatment. The Judge did not err in denying respondent and its insurance carrier's request to terminate benefits.

## DECISION

**WHEREFORE**, the March 29, 2007, preliminary hearing Order entered by Judge Clark is affirmed.

**IT IS SO ORDERED.**

Dated this ____ day of June, 2007.

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge